Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

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PATRICK REGAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the element of materiality of testimony in a prosecution for Grand Jury perjury under 18 U.S. Code 1623(a) requires the government to plead and prove the existence and scope of evidence placed before the Grand Jury, as distinguished from proving that an investigation was being conducted outside the Grand Jury by government investigators.

2. Whether the government can prove the element of materiality in a prosecution for Grand Jury perjury under 18 U.S. Code 1623(a) without ever offering testimony from a grand juror or a prosecutor or by using the Grand Jury minutes or similar means to prove what evidence the Grand Jury heard, what instructions it received, or "what decision [the Grand Jury] was trying to make" (see, *United States v. Gaudin*, _U.S._, 115 S.Ct. 2310, 2313 (1995)).

3. Whether bad faith of investigators in contriving the basis for calling a witness before the Grand Jury constitutes a defense to the element of materiality that the defendant has the right to raise before the trial jury in a prosecution for perjury under 18 U.S. Code 1623(a).

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PATRICK REGAN,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

Patrick Regan petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

REPORTED OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York, Chin, J., is reported at 897 F.Supp. 748 (1995).

The opinion of the United States Court of Appeals for the Second Circuit is reported at 103 F.3d 1072 (1997).

JURISDICTIONAL STATEMENT

1. The judgment sought to be reviewed was originally issued January 6, 1997.

2. The Order denying rehearing was issued February 25, 1997.

3. The statutory provision conferring jurisdiction upon this Court to review the judgment in question by writ of certiorari is 28 U.S.C. 125 (1).

STATUTES INVOLVED

18 U.S. Code 1623 (a):

Whoever under oath (or in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code) in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or uses any other information, including any book, paper, document, record, recording, or other material knowing the same to contain any false material declaration shall be fined under this title or imprisoned not more than five years, or both.

STATEMENT OF THE CASE

In January 1995, the Petitioner, a New York City Police officer, was indicted for two counts of perjury in violation of 18 U.S. Code 1623(a). The indictment alleged that he made "false material declarations" before a Grand Jury sitting in the Southern District of New York on October 13th and 18th, 1994.

Petitioner was the first witness called before a new Grand Jury. His testimony took place several months after the conclusion of lengthy proceedings before an earlier Grand Jury that had failed to return any indictments in connection with an investigation being conducted by the United States Attorney into allegations that Petitioner's fellow officers of an Anticrime Unit in which Petitioner had served, but not Petitioner himself, had illegally searched drug sellers in Manhattan's 34th Precinct. Petitioner, a hero police officer who had once taken a bullet wound to the head in the line of duty and had received the New York City Police Department's highest award to a surviving officer, was not called before the earlier Grand Jury.

Petitioner was summoned to appear before the new Grand Jury after the government engaged in contrived investigatory activity to set up the appearance, i.e., the government caused two federal drug informants, brothers named Ramon and Jose Rodriguez, to telephone Petitioner and relate fictitious events to him for the purpose of generating tape recorded conversations about which Petitioner could then be questioned before the Grand Jury. Although Rodriguez brothers were not involved in any of the police searches that were under investigation, the

government had Ramon Rodriguez tell Petitioner that he been questioned "downtown" by federal officials investigating the Anticrime Unit. In the ensuing conversations with Ramon, Petitioner asked Ramon what Ramon had been asked during these fictitious meetings and advised Ramon to state, truthfully, that he knew nothing about the matters under investigation.

Petitioner was then called before the new Grand Jury and questioned about these conversations with Ramon Rodriguez. He was subsequently charged with, and convicted of perjury for professing to have only limited recollection about them. Parenthetically, although Petitioner asked the prosecutors questioning him before the Grand Jury for help in refreshing his recollection, they failed to play any of the tapes for him.

Petitioner was also questioned before the Grand Jury about other conversations the U.S. Attorney had recorded between Petitioner and Ramon's brother, Jose Rodriguez. Jose had, for investigative purposes, told Petitioner fictitiously that he knew the current whereabouts of a drug dealer name Almonte, someone who had been the subject of one of the police searches under investigation. The government investigators believed that Petitioner or his colleagues would then seek out Almonte in an attempt to obstruct justice, but this did not happen and Petitioner expressed no interest in Almonte's whereabouts. Petitioner was then also charged with, but acquitted of, perjury relating to his lack of recollection of these conversations with Jose. Thus, the counts of perjury for which Petitioner was convicted related entirely to his conversations with Ramon Rodriguez about fictitious events, completely contrived by the United States government.

After Petitioner testified before the new Grand Jury, the U.S. Attorney placed one of its own investigators before it. This witness, Sgt. McGuigan, gave a brief, hearsay summary of the government's prior investigation of the Anticrime Unit, without ever mentioning the existence of the prior Grand Jury or perforce referring to any evidence heard by it or the fact it had returned no indictments. The prosecutors also never informed the new Grand Jury, which indicted Petitioner, what, if anything, the new Grand Jury itself was being asked to investigate or what its goals were.

No doubt as a consequence of these omissions, the perjury indictment of Petitioner contained no language alleging the existence of any actual investigation by any Grand Jury, but merely recited that Petitioner had been subpoenaed before the Grand Jury "in connection with" a "federal investigation into the activities of the Anticrime Unit." The indictment contained no further explanation of what was "material" about the defendant's testimony.

At Petitioner's trial, the government never proved that any substantive indictments were returned by either Grand Jury (there were none), or called as a witness any grand juror or prosecutor who presented the case, or introduced into evidence the Grand Jury testimony of anyone besides the Petitioner. Nor was there proof that either Grand Jury had been instructed about the scope of any investigation or the relevance of any testimony. Instead, the government attempted to prove the element of "materiality" by the unusual if not unprecedented device of calling as trial witnesses its investigator, Sgt. McGuigan, and an Assistant U.S. Attorney, and having them describe

to the trial jury evidence of alleged misconduct they themselves, as opposed to any Grand Jury, purportedly gathered about the Anticrime Unit. The trial jury also heard tapes of Petitioner's conversations with the Rodriguez brothers but there was never any evidence put before the jury of what testimony the Grand Jury itself had heard or even whether or not these tapes had ever been played before the Grand Jury.

Petitioner moved unsuccessfully prior to trial to dismiss the indictment, citing the insufficiency of the allegation of materiality, abuse of the Grand Jury, and arguing that the prosecution had engaged in a "perjury trap". *United States v. Regan,* 897 F.Supp.748 (S.D.N.Y. 1995). Petitioner then sought the right to prove at trial the bad faith of the prosecutors because the allegations of misconduct against Anticrime Unit had actually been disproven by the government investigators and the claim of the materiality of Petitioner's Grand Jury testimony had been the result of government contrivance. The trial court ruled, however, that the government and the Grand Jury were indistinguishable entities in an investigation and therefore limited the issue of materiality for the trial jury to whether allegations about police misconduct were received by government investigators, and not whether they were received in good faith or pursued in good faith.

The outcome was a guilty verdict to perjury specifications which charged that the Petitioner lied, not in the context of any Grand Jury investigation, not about any police misconduct and indeed not about any real event at all, but rather about whether or not he could recall discussing with Ramon Rodriguez the government-staged scenario of the taped conversations, *to wit*, that Ramon had

been questioned by federal investigators in their investigation about the Anticrime Unit. This fictitious scenario was contrived for the purpose of creating taped conversations between Petitioner and Ramon, who was never actually a witness in any investigation that actually existed before the Grand Jury.

Petitioner appealed his conviction to the Second Circuit Court of Appeals, arguing that there was insufficient proof of materiality and that the trial court had deprived him of the right to raise, as a jury issue in defense to an element of the crime, the bad faith of the prosecutors in contriving a claim of materiality. On January 6, 1997, the Court affirmed Petitioner's conviction in an opinion by Judge Leval. *United States v. Regan*, 103 F.3d 1072 (2d Cir. 1997). Petitioner's motion for Rehearing and suggestion for Rehearing En Banc was denied on February 25, 1997.

REASONS FOR GRANTING THE WRIT

Decisions by the U.S. Supreme Court and various Circuit Courts have explicitly recognized that perjury is an offense uniquely subject to abuse and manipulation by prosecutors who appear before the Grand Jury. *E.g. Bronston v. United States*, 409 U.S. 352, 360, 93 S.Ct. 595, 34 L.Ed.2d 568 (1973), *Brown v. United States*, 245 F.2d 549 (8th Cir. 1957). Also see, *United States v. Williams,* 504 U.S. 36 at 46 n.6, 112 S.Ct. 1735, 118 L.Ed.2d 352 (1992) (citing prosecutorial misconduct relating to the perjury statute as affecting the "integrity of the grand jury").

The Grand Jury has a time honored role as an independent body, separate and distinct from the prosecutor. *United States v. Williams, supra*, 504 U.S. at pp.47 *et seq.* The decisions whether to charge, and what to charge, are within the Grand Jury's exclusive control. *Stirone v. United States*, 361 U.S. 212, 215-216, 80 S.Ct. 270 (1960). The statute defining the crime of perjury, 18 U.S. Code 1623 (a), requires that the false testimony be "material" and that it be material to a formal "proceeding" by or ancillary to a court or grand jury, not merely to government investigation. *Dunn v. United States*, 442 U.S. 101, 99 S.Ct. 2190, 60 L.Ed.2d 743 (1979).

Consistent with those principles, the Supreme Court recently, in *United States v. Gaudin*, _U.S._, 115 S.Ct. 2310 (1995), held that the element of "materiality" in a perjury prosecution was a question of fact for the trial jury to decide. The court defined the key factual component of materiality as "what decision was [the body that received the testimony] trying to make". The Court further stated

that the "materiality inquiry" is "peculiarly on[e] for the trier of fact "since it involves "delicate assessments of the inferences a 'reasonable [decisionmaker] would draw from a given set of facts and the significance of those inferences to him". 115 S.Ct. at 2314-2315.

In the instant case, however, the "decisionmaker", i.e. the Grand Jury that indicted for perjury, was kept out of the loop by the prosecutors, who merely used the Grand Jury as a forum for eliciting testimony. No investigation by the Grand Jury was pleaded in the indictment and none was proven before the trial jury. In short, the Grand Jury performed no function to which the element of "materiality" could apply.

Thus, the decision of the Second Circuit in the instant case allows the prosecutors to substitute their own inquiry for a Grand Jury investigation and their own conclusions about what was "material" for one by the Grand Jury, while at the same time foreclosing any examination of this issue by the trial jury. This is contrary to the principle of Grand Jury independence set forth above. It gives the prosecutor the power to manipulate the proceedings to create perjury cases. It is also contrary to this Court's concept of the element of "materiality" as set forth in *Gaudin*.

This case, then, raises questions about the application of this Court's holding in *Gaudin*. Does the materiality element permit an examination by the trial jury of whether the Grand Jury was exercising its own function, as opposed to being manipulated by the prosecutors? This is an important question for, as Judge Learned Hand recognized many years ago, "[s]ave for torture, it would be

hard to find a more effective tool of tyranny than the power of the unlimited and unchecked *ex parte* examination." *United States v. Remington*, 208 F.2d 563, 573 (2d Cir. 1953) (dissenting opn.). *See, generally*, B. Gershman, *The Perjury Trap*, 129 U.Pa.L.Rev. 624 (1981).

"Materiality" is defined as "whether the false testimony has a *natural effect or tendency* to influence, impede, or dissuade the grand jury form pursing *its* investigation," *Carroll v. United States*, 15 F.2d 951, 953 (2d Cir.), *cert. denied*, 273 U.S. 763, 47 S.Ct. 477, 71 L.Ed. 880 (1927) (emphasis added), cited with approval in *Kungys v. United States*, 485 U.S. 759, 770, 108 S.Ct. 1537, 1546, 99 L.Ed.2d 839 (1988). The testimony must be capable of influencing "*the decision of 'the decision making body to which it was addressed.*' " 485 U.S. at 770, 108 S.Ct. at 1546 (emphasis added). The underlined words would seem to require good faith on the part of the prosecutor, a concept which the Second Circuit declined to apply in this case.

A number of circuit courts have previously assumed that good faith is a natural component of the materiality inquiry, without, however directly confronting the issue raised by the instant case. In *United States v. Mancuso*, 485 F.2d 275 (2d Cir. 1973) the court stated that an inquiry into materiality required the finder of fact, then considered to be appropriately the trial court, to "examine both the nature of the inquiry at which the testimony was given and the evidence introduced at trial to prove its falsity, in order to determine whether a truthful answer could conceivably have aided the grand jury investigation". 485 F.2d at 281. The court in *Mancuso* stated that the inquiry must be a "legitimate" one into a "material event" which cannot be

based upon a "false or erroneous impression" which is inadvertently created or, even worse, contrived by the prosecutor. 485 F.2d at 281. Also, *United States v. Slawik*, 548 F.3d 75, 84 (3rd Cir. 1977) (petit jury must put itself in position of grand jury in analyzing evidence of perjury), and *United States v. Chen*, 993 F.2d 793 (11th Cir. 1991) and cases cited therein at pp. 796-797, imply a good faith component of materiality.

Unfortunately, the Second Circuit's opinion in this case explicitly rules good faith out of the materiality equation, and implicitly cancels the role of the Grand Jury as well. Certiorari should be granted for this court to amplify its holding in *Gaudin* and uphold the independence and integrity of Grand Jury proceedings from prosecutorial manipulation.

Respectfully submitted,

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Attorney for Petitioner
Patrick Regan

Of Counsel:
Bennett M. Epstein

Dated: New York, NY
May 10, 1996

No. _____

In The

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October Term, 1996

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PATRICK REGAN,

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UNITED STATES OF AMERICA,

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APPENDIX

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St. Louis West, Inc. (6233)

Appendix A - Decision of the United States Court of Appeals for the Second Circuit, Decided January 6, 1997 (103 F.3d 1072 (1997) [Pages 1a - 26a]

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 569—August Term, 1996

(Argued: November 4, 1996

Decided: January 6, 1997)

Docket No. 96-1211

UNITED STATES OF AMERICA,

Appellee,

—v.—

PATRICK REGAN,

Defendant-Appellant.

Before:

FEINBERG, LEVAL, and PARKER,

Circuit Judges.

Defendant appeals from the judgment of the United States District Court, Southern District of New York (Chin, *J.*), convicting him, following a jury trial, of

perjury in violation of 18 U.S.C. § 1623, and sentencing him to a term of imprisonment of one year and one day, a term of supervised release of two years, and a special assessment of $100. Defendant argues that the district court erred in (1) refusing to dismiss the indictment on account of alleged abuses of the grand jury process, (2) preventing him from introducing evidence of these alleged abuses and other impeachment evidence, and (3) denying his motion to disqualify one of the prosecutors. Defendant also challenges the sufficiency of the evidence that his false statements were "material" and the district court's enhancement of his sentencing range.

Affirmed.

DEBORAH E. LANDIS, Assistant United States Attorney, New York, N.Y., (Mary Jo White, United States Attorney for the Southern District of New York, New York, N.Y., Matthew E. Fishbein, and Craig A. Stewart, Of Counsel), *for Appellee*.

BENNETT M. EPSTEIN, New York, N.Y., (David S. Greenfield, New York, N.Y., On the Brief), *for Appellant*.

LEVAL, *Circuit Judge*:

Defendant Patrick Regan appeals from a judgment of the United States District Court, Southern District of New York (Denny Chin, *Judge*), convicting him,

following a jury trial, of perjury in violation of 18 U.S.C. § 1623, and sentencing him to a term of imprisonment of one year and one day, a term of supervised release of two years, and a special assessment of $100.

On appeal, Regan challenges the district court's pretrial rulings (1) refusing to dismiss the indictment on account of the government's alleged abuse of the grand jury process, (2) precluding him from introducing at trial evidence that the government's investigation was illegitimate and that the witnesses who inspired the investigation were untrustworthy, and (3) denying his motion to call as a witness the prosecutor who interviewed him before the Grand Jury or to disqualify her from prosecuting his trial. Regan also argues that the evidence of materiality was insufficient and that the district court improperly enhanced his sentence for "substantial interference with the administration of justice."

We affirm the judgment of the district court in all respects.

Background

In 1991 and 1992, Regan worked in the 34th Precinct Anti-Crime Unit, a plain-clothes unit of the New York City Police Department that operated in Washington Heights, Manhattan and focused largely on violent street crime.

On August 14, 1992, Regan and two other members of the Anti-Crime Unit arrested Jorge Almonte for possession of narcotics and a firearm. The Anti-Crime Unit turned Almonte over to federal authorities for prosecution, representing that the arresting officers saw him with a gun in his waistband and that when they began to

chase him he dropped a bag containing narcotics. When Almonte's attorney claimed that the officers were lying about the circumstances of his client's arrest, the government began to investigate whether members of the Anti-Crime Unit had lied about this and other arrests.

After interviewing the arresting officers and other witnesses, including a worker who had been installing cable in Almonte's building and had no connection to Almonte, the government developed doubts about the officers' account of events following Almonte's arrest. Because its case against Almonte depended on the testimony of these officers, the government filed a *nolle prosequi* and declined to prosecute the case.

On July 22, 1992, three members of the Anti-Crime Unit, including the two officers with whom Regan arrested Almonte, arrested individuals named Nieves and Abreu on guns and narcotics charges. Regan was not involved in this arrest. During the federal prosecution of Nieves and Abreu, it became apparent that those officers' accounts of this arrest were also false. As a result, the government filed a *nolle prosequi* and the charges were dismissed.

In the autumn of 1992, the government began an investigation, assisted by the New York County District Attorney's Office and the Special Narcotics Prosecutor's Office, to determine whether the misconduct in the *Almonte* and *Nieves* cases was part of a broader pattern within the Anti-Crime Unit. This investigation continued well into 1994.

In May 1994, the government interviewed José Rodriguez (José), a confidential informant for the Drug Enforcement Administration (DEA). José claimed that in December 1992 he and his brother, Ramon Rodriguez

(Ramon), had met with Regan and other members of the Anti-Crime Unit about locating Almonte. José said that he believed that the officers wished to find Almonte in order to "set [him] up" by placing drugs on him, or for some other bad purpose. José's knowledge of the Almonte case and details about Regan and the other officers enhanced his credibility with the government.

Investigators then arranged for José to call Regan and to claim that he had located Almonte. The resulting tape-recorded telephone call suggested that José and Regan had previously discussed Almonte. To obtain additional corroboration for José's claims, the government contacted his brother Ramon, who had previously worked as a DEA informant but was "no longer considered entirely reliable."

Ramon initially denied having any information about misconduct in the Anti-Crime Unit. But in an interview on August 26, 1994, at the United States Attorney's Office, he said that he had worked as an informant for the Anti-Crime Unit, which was not authorized to use informants. Ramon also said that Regan had told him that members of the Anti-Crime Unit wanted to "plant" drugs on Almonte and had given him a photograph to assist in locating Almonte.

During this interview, investigators showed Ramon pictures of members of the Anti-Crime Unit. He was able to identify several of them by name and also to give Regan's beeper number. Ramon said that on the previous evening he had told Regan that he was to be questioned by federal authorities about the Anti-Crime Unit. He also claimed that Regan told him to lie about his relationship with the Anti-Crime Unit and instructed him to report back about the substance of his interrogation.

During this meeting, investigators told Ramon to call Regan and tape-recorded the ensuing conversation, in which Regan extensively questioned Ramon about his meeting with federal authorities, referred specifically to cases under investigation, including the *Almonte* and *Nieves* cases, and coached Ramon about how to respond to questioning.

In several subsequent tape-recorded telephone conversations during August and September of 1994, Regan asked Ramon for details of his meetings with federal authorities, including the names and positions of the individual investigators, and advised him about appropriate responses. On one occasion, he specifically told Ramon not to mention his name.

At the end of August 1994, the term of the Grand Jury that had heard testimony about the Anti-Crime Unit expired. As the investigation was not complete, the government did not seek an indictment from that Grand Jury, but convened a second Grand Jury to continue the investigation. At that point, the government could not locate the cable installer who had provided the evidence demonstrating that Regan and his colleagues had lied about Almonte's arrest. As a result, the government felt that it had inadequate evidence to proceed against Regan. The government believed, however, that Regan could provide evidence about misconduct by his colleagues. It therefore decided to immunize Regan under 18 U.S.C. § 6001 *et seq.* and subpoena him to testify before the second Grand Jury.

Represented by counsel, Regan appeared before the Grand Jury on October 13, 1994 and October 18, 1994. Assistant United States Attorney (AUSA) Deborah Landis conducted most of the examination of Regan.

AUSA Paul Gardephe was also present for most of the proceedings and sometimes questioned Regan.

During Regan's appearance on October 13, the government asked him about his use of informants and his relationship with Ramon. Among other things, Regan denied that he had spoken with Ramon about the federal investigation of the Anti-Crime Unit or about the arrests that were the subject of that investigation, that Ramon had told him that he had been subpoenaed and questioned with respect to the investigation, and that he had advised Ramon about proper responses to potential questions. Regan also denied that he had asked the Rodriguez brothers to help him locate Almonte and that José had told him that he had located Almonte.

During his appearance before the Grand Jury on October 18, 1994, Regan said, among other things, that he did not remember Ramon mentioning Almonte's name. Regan also said that he did not recall having a conversation with Ramon about the fact that Ramon had been interviewed by federal authorities and the Internal Affairs Bureau concerning the Anti-Crime Unit. Regan testified that "it would be no of [sic] significant importance for me whether [Ramon] was being interviewed or not."

After Regan's testimony, the government presented the successor Grand Jury with a summary of the evidence previously introduced before the first Grand Jury. Before seeking an indictment for perjury, members of the U.S. Attorney's Office met with Regan and his attorney and informed them of the nature of the investigation of the Anti-Crime Unit and the tape-recorded conversations. The AUSAs explained that Regan's lies had prevented the government from exploring before the Grand Jury

the circumstances surrounding the arrest of Almonte and the alleged plot to set him up. The AUSAs allowed Regan to listen to the tapes with his attorney and made clear that they were still looking for a truthful explanation. They said that if Regan confessed his earlier falsities, they would then have additional follow-up questions for him.

After reviewing the tapes, Regan's attorney arranged to meet with the government before the scheduled Grand Jury hearing. But Regan and his attorney did not appear at the appointed time or explain their absence. Thereafter the Grand Jury issued a two-count indictment charging Regan with perjury in violation of 18 U.S.C. § 1623. The indictment alleged that Regan made "false material declarations" before the Grand Jury.

Before trial, Regan moved to dismiss the indictment and to disqualify AUSAs Landis and Gardephe, who had questioned him before the Grand Jury. In seeking dismissal of the indictment, Regan argued principally that his allegedly false statements were not "material" to any legitimate investigation by the Grand Jury and that the government had elicited those statements by abusing the grand jury process and entrapping him into perjury. As to the disqualification of Landis and Gardephe, Regan argued that he needed to call them as witnesses to testify about their examination of him before the Grand Jury and that allowing them to represent the government would enable them to act as unsworn witnesses at trial.

The district court denied all of Regan's pre-trial motions. *United States v. Regan*, 897 F. Supp. 748 (S.D.N.Y. 1995). The court found the record "unequivocally shows that Regan was subpoenaed by the Grand Jury not for the purpose of 'trapping' him into commit-

ting perjury, but for the purpose of seeking evidence that would assist the Grand Jury in its inquiry into the activities of the Anti-Crime Unit." *Id.* at 754. The court also ruled that the Grand Jury was properly instructed on the issue of materiality, that the indictment gave sufficient notice of the charges against Regan, and that the questions posed to Regan before the Grand Jury were not too ambiguous to support perjury charges. *Id.* at 755-57. Finding that Regan had not demonstrated a "compelling and legitimate need" to call Landis as a witness and rejecting the concern that she could act as an unsworn witness, the court denied Regan's motion to disqualify her. *Id.* at 758.

The court also ruled that Regan's "perjury trap" defense was a question of law concerning outrageous governmental conduct, not a question of "materiality" for the jury to decide. Having rejected this defense as a matter of law, the court precluded Regan from presenting evidence at trial to support it. *Id.*

On August 7, 1995, three days before trial was scheduled to begin, the government informed the court that it would not call José Rodriguez as a witness at trial. As a result, it dropped four perjury specifications to which José would have testified. The government said that it still wished to introduce the allegations of the Rodriguez brothers, not for their truth, but to show the basis for its investigation, and thus the materiality of Regan's statements. The government asked the court to instruct the jury that the statements of the Rodriguez brothers were being introduced not for their truth, but only for the limited purpose of showing the subject matter of the Grand Jury's investigation and thereby establishing the materiality of Regan's remarks.

At a hearing on the same day, Regan asked the court for permission to present the jury with a defense of "contrived materiality." This defense apparently was to consist of an argument that the prosecutors "were a little bit zealous to justify the investigation and presented half-truths and untruths to the [grand] jury."

In a memorandum decision dated August 9, 1995, the district court rejected Regan's "contrived materiality" defense as "essentially his perjury trap argument under a different label." Finding that the government was not offering the Rodriguez brothers' allegations for their truth, and that evidence impeaching their credibility would have little probative value and would cause confusion, the court ruled that it would exclude evidence "intended solely to attack [their] credibility."

After a five-day trial, the jury convicted Regan on 28 specifications of perjury and acquitted him on 18 specifications. In particular, the jury found that Regan committed perjury when he denied knowing that Ramon had been questioned and subpoenaed with respect to the federal investigation, denied having any interest in what Ramon told the investigators, and denied having told Ramon not to mention his name to the investigators.

After denying all of Regan's post-trial motions, the court sentenced him on March 19, 1996. Finding that Regan's perjury had substantially interfered with the administration of justice, the court, under U.S.S.G. § 2J1.3(b)(2), applied a three-level enhancement to his base offense level of twelve, resulting in an adjusted offense level of fifteen and a sentencing range of 18-24 months. Over the government's objection, the court departed downward under U.S.S.G. § 5K2.O, imposing

a sentence of one year and one day of imprisonment and two years of supervised release.

Discussion

On appeal, Regan argues that the district court erred in (1) refusing to dismiss the indictment on account of the government's alleged abuse of the grand jury process, (2) precluding him from introducing at trial evidence that the government's investigation was illegitimate and that the witnesses who inspired the investigation were untrustworthy, (3) denying his motion to call AUSA Landis as a witness or to disqualify her as prosecutor, (4) ruling that the evidence of materiality was sufficient to support the jury's verdict, and (5) enhancing his sentence for "substantial interference with the administration of justice."

I. *The Pre-Trial Rulings*

A. *Propriety of the Grand Jury Proceedings*

Invoking the "perjury trap" doctrine, which this court has discussed but not adopted, *see Wheel v. Robinson*, 34 F.3d 60, 67-68 (2d Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S. Ct. 1697 (1995), Regan argues that the district court should have dismissed the indictment for improprieties surrounding his grand jury testimony. In essence, Regan claims that the government violated the due process clause of the Fifth Amendment by calling him before the Grand Jury "for the primary purpose of obtaining testimony from him in order to prosecute him later for perjury," *id.* at 67 (quoting *United States v. Chen*, 933 F.2d 793, 796 (9th Cir. 1991)), and that this conduct required dismissal of the indictment. We have noted that the existence of a "legitimate basis" for an

investigation and for particular questions answered falsely precludes "any application of the 'perjury trap' doctrine." *Wheel*, 34 F.3d at 68.

The record supports the district court's ruling that the government had legitimate grounds to investigate the Anti-Crime Unit, to call Regan before the Grand Jury, and to ask the questions that Regan answered falsely. The government decided to subpoena and immunize Regan after almost two years of investigation into the conduct of the Anti-Crime Unit. At that time, it had obtained evidence that members of that unit had made false statements with respect to numerous state and federal prosecutions and had sought to plant drugs on Almonte. Furthermore, there was evidence that Regan had communicated with the Rodriguez brothers about Almonte and had coached Ramon about what to tell investigators. It was therefore appropriate for the government to ask Regan about his conversations with the Rodriguez brothers.

In short, it is clear that the government was conducting a bona fide investigation into allegations of wrongdoing by the Anti-Crime Unit and that its decision to immunize and subpoena Regan was a step in that investigation. The record thus amply supports the district court's finding that the government did not call Regan solely in order to entrap him into committing perjury. As in *Wheel*, 34 F.3d at 67-68, we find that the facts of this case "render the perjury trap defense inapplicable" and thus do not decide whether this defense is available in the Second Circuit.

Regan also claims that the government abused and misled the Grand Jury and abused its process by (1) calling him as the first witness without establishing the basis

for the inquiry; (2) calling him on short notice and refusing to disclose the subject of the inquiry; (3) asking him almost no questions about "real" events and focusing instead on details of "staged" conversations; (4) refusing to play the tape recordings of his conversations with the Rodriguez brothers or otherwise to refresh his recollection; (5) questioning him in a hostile and intimidating manner; and (6) failing to inform the Grand Jury that a prior Grand Jury had investigated the Anti-Crime Unit without returning an indictment, that the Rodriguezes were unreliable witnesses, or that the allegations against the Anti-Crime Unit had been disproven. Regan says that these tactics were designed to elicit false answers and thus deprived him of due process, requiring dismissal of the indictment.

We have reviewed the record relating to Regan's grand jury testimony and find that the government's conduct was proper in all respects. First, the government was under no obligation to present the Grand Jury with contextual evidence before calling Regan to testify. Indeed, it could reasonably have anticipated that Regan's truthful testimony would provide the Grand Jury with all the background information it would need. When Regan's testimony proved not to include such information, the government called Sergeant McGuigan, an officer involved in the investigation of the Anti-Crime Unit, to give the Grand Jury more details about that investigation. We find nothing improper in the order in which the government choose to present evidence to the Grand Jury.

Second, the record refutes Regan's contention that the government brought him before the Grand Jury on short notice and, by refusing to grant an adjournment, required him to appear with substitute counsel. Regan in fact

received ten days' notice of the Grand Jury proceedings, and was forced to appear with new counsel not because his original attorney was unavailable on the scheduled day, but because that attorney's representation of another member of the Anti-Crime Unit created a possible conflict.

The government's refusal to tell Regan the subject matter of the grand jury proceeding was appropriate. The government believed, not unreasonably, that if Regan knew this subject matter in advance, he might fabricate testimony to exculpate himself and other members of the Anti-Crime Unit. (Moreover, the record suggests that advance warning about the nature of the grand jury inquiry would not have altered Regan's testimony. His testimony at the second hearing on October 18, 1994, after the substance of the inquiry had become clear, was essentially the same as his initial testimony on October 13, 1994.)

Third, we reject Regan's contention that the government questioned him only on insignificant matters about which he would likely have no recollection. The government asked questions central to its investigation of the Anti-Crime Unit: To wit, questions about Almonte's original arrest, the alleged attempts to locate him, the arrest of Nieves and Abreu, the Anti-Crime Unit's use of informants, and another arrest by the Anti-Crime Unit. That the government also questioned Regan extensively about his telephone conversations with the Rodriguez brothers was in no way improper. Those conversations suggested misconduct in the Anti-Crime Unit and were therefore a logical subject for questioning.

Fourth, the transcript of Regan's grand jury testimony also contradicts his claim that the government made no

attempt to refresh his recollection about his conversations with the Rodriguez brothers. On several occasions, the government paraphrased or quoted from the transcripts of the recordings of these conversations. Moreover, the government's questions were neither vague nor focused on insignificant details that might slip from memory. On the contrary, the prosecutors asked Regan if he had spoken with the Rodriguez brothers within a specific time period and asked him to describe the general contours of the conversations. It is true the government never played its recordings of these conversations. But it was under no obligation to do so, *United States v. D'Auria*, 672 F.2d 1085, 1093 (2d Cir. 1982), or even to inform Regan that such recordings existed. *United States v. Del Toro*, 513 F.2d 656, 664 (2d Cir.), *cert. denied*, 423 U.S. 826, 96 S. Ct. 41 (1975).

Fifth, we find no basis for Regan's argument that the government created a hostile, confusing environment during his grand jury testimony, with the two prosecutors "taking over for each other every few lines." In fact, AUSA Landis asked most of the questions; AUSA Gardephe participated only occasionally.

Finally, we reject Regan's contentions that the government knowingly presented the Grand Jury with false evidence and withheld from it material exculpatory evidence. These arguments are premised on factual and legal errors. Regan contends, for example, that the government concealed the fact that a prior Grand Jury had exonerated the Anti-Crime Unit. The first Grand Jury reached no such conclusion. Its term expired before the completion of its investigation.

Regan also claims that the government knowingly allowed José Rodriguez to testify falsely before the

Grand Jury that he had no prior relationship with Almonte. This allegation is based on mere speculation arising from a police report from November 1992 stating that a person named José Rodriguez rented a basement apartment in the building on 187th Street in which Almonte lived. As 173 persons named José Rodriguez were listed in the 1991-92 Manhattan and Bronx telephone books, and there was no apparent connection between Almonte and the basement apartment, the existence of this one report hardly suggests that the government knew of a prior connection between José and Almonte. Moreover, AUSA Landis has affirmed that she did not even learn of this report until August of 1995. On this record, we cannot conclude that the government knowingly presented perjured testimony to the Grand Jury.

Regan also takes issue with the government's failure to inform the Grand Jury of the Rodriguez brothers' criminal histories and general untrustworthiness and to provide it with other possibly exculpatory material. The government had no obligation to present exculpatory material to a grand jury. *United States v. Williams*, 504 U.S. 36, 51-52, 112 S. Ct. 1735, 1744-45 (1992).

Having considered Regan's various objections to the circumstances surrounding his testimony before the Grand Jury, we find no evidence of impropriety and no support for his arguments. Accordingly, we affirm the district court's decision not to dismiss the indictment.

B. "*Contrived Materiality*"

Regan argues that the district court erred in preventing him from introducing evidence at trial that the grand jury investigation was illegitimate. Regan contends that *United States v. Gaudin*, ___ U.S. ___, 115 S. Ct. 2310

(1995), requires the government to prove, and the jury to find, that he made a false statement that was material to a *legitimate* grand jury investigation. Regan says that the district court first erred in precluding him from introducing evidence of the illegitimacy of the grand jury proceedings, and then compounded the error by instructing the jury that the court had found the proceedings legitimate. We disagree with Regan's reading of *Gaudin* and affirm the decision of the district court.

In *Gaudin*, a prosecution for making a false statement on an HUD form in violation of 18 U.S.C. § 1001, the Supreme Court held that because materiality is an essential element of that offense, the jury, not the court, must determine whether a false statement is material. *Id.* at ___, 115 S. Ct. at 2320. Although *Gaudin* involved a different offense, we assume its reasoning also applies to perjury prosecutions under 18 U.S.C. § 1623.

In ruling that the jury must determine the materiality of a false statement, the Supreme Court did not purport to alter the longstanding definition of that element. This court has held since at least 1927 that the test of materiality is simply "whether the false testimony has a natural effect or tendency to influence, impede, or dissuade the grand jury from pursuing its investigation." *Carroll v. United States*, 16 F.2d 951, 953 (2d Cir.), *cert. denied*, 273 U.S. 763, 47 S. Ct. 477 (1927). The Supreme Court has specifically endorsed this test. *Kungys v. United States*, 485 U.S. 759, 770, 108 S. Ct. 1537, 1546 (1988). The many cases reciting and applying this standard do not require an additional finding that the investigation be "legitimate," and we will not add this element without a clear reason for doing so.

To expand the definition of materiality in the manner Regan proposes would require juries in perjury cases to evaluate the government's motives for bringing particular investigations, its conduct before grand juries, and the quality of the evidence submitted to grand juries. As these considerations are wholly distinct from "materiality," in the sense of the pertinence of the particular testimony to the investigation, adding this requirement would add a new element to the crime. We see no reason to do so.

Nor was it error for the district court to prevent Regan from presenting his "contrived materiality" defense to the jury. Although Regan attempts to characterize his claim that the grand jury investigation was a sham as an affirmative defense to the crime of perjury, the argument is, as the district court observed, "essentially his perjury trap argument under a different label." As such, his claim turns not on the fact that his conduct was somehow blameless or justified, but rather on the notion that "outrageous governmental conduct" required dismissal of the indictment. *See United States v. Cuervelo*, 949 F.2d 559, 565 (2d Cir. 1991).

A motion to dismiss an indictment on account of outrageous government conduct is directed to the court rather than jury. *Id.* at 567. Indeed, we have specifically noted that it is "preferable to leave any issues of the lawfulness of the grand jury inquiry for determination by the Court." *United States v. Rosado*, 728 F.2d 89, 95 (2d Cir. 1984). *Rosado* exemplifies why the lawfulness of a grand jury investigation is better left to the court. In that case, involving a trial for criminal contempt for refusing to give evidence, we observed that the district court's admission of evidence about the propriety of the grand jury proceedings had turned the trial "away from a deter-

mination of whether the elements of the offense charged had been proved beyond a reasonable doubt into a wide-ranging inquiry into matters far beyond the scope of legitimate issues in a criminal trial." *Id.* at 93.

Moreover, whether it bears the name of "perjury trap" or "contrived materiality," Regan's claim that the government called him before the grand jury solely to elicit perjured testimony is, like a claim of selective prosecution, ultimately separate from the issue of his factual guilt. The Supreme Court has observed that a "selective-prosecution claim is not a defense on the merits to the criminal charge itself, but an independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution." *United States v. Armstrong*, ___ U.S. ___, 116 S. Ct. 1480, 1486 (1996). Because it involves a "defect in the institution of the prosecution," the selective prosecution defense is an issue for the court rather than the jury. *See, e.g., United States v. Jones*, 52 F.3d 924, 927 (11th Cir.), *cert. denied*, ___ U.S. ___, 116 S. Ct. 265 (1995); *United States v. Washington*, 705 F.2d 489, 495 (D.C. Cir. 1983) (citing Fed. R. Crim. P. 12(b)(1)).

Regan's claim is similarly unrelated to factual innocence of the crime charged. Regan does not contest that he lied before the grand jury. Rather, he contends that his lies were not "material" because the government staged its investigation in order to elicit his lies. As a result, his claim stems from a constitutional violation in the institution of his prosecution, rather than factual innocence, and was properly resolved by the court. *See* Fed. R. Crim. P. 12(b)(1). *Cf. United States v. Taylor*, 562 F.2d 1345, 1356 (2d Cir.), *cert. denied*, 432 U.S. 909, 97 S. Ct. 2958 (1977) (citing Rule 12(b)(1) as basis for resolution by court of selective prosecution claim).

In short, we believe that *Gaudin* does not require us to expand the definition of materiality in the manner Regan argues, and also that to do so would involve juries in an inquiry for which they are ill-suited. For this reason, we agree with the district court's decision to resolve for itself whether the government's conduct was lawful and to prevent Regan from presenting evidence on that subject.

C. *Impeachment of the Rodriguez Brothers*

Regan argues that the district court erred in preventing him from introducing evidence to impeach the credibility of the Rodriguez brothers. He maintains that although the Rodriguez brothers did not testify, their allegations of misconduct by members of the Anti-Crime Unit were introduced to prove such misconduct. Because these allegations were admitted for their truth, Regan argues, the district court's refusal to allow him to cross examine or impeach the Rodriguez brothers deprived him of his right to confrontation.

Despite Regan's vehement protestations to the contrary, it is clear that the statements of the Rodriguez brothers were not introduced for their truth. The district court repeatedly instructed the jury that the allegations of misconduct made by the Rodriguez brothers and by other witnesses were not offered for their truth, but simply as "background evidence" of the events that led to the investigation of the Anti-Crime Unit. It is obvious from the record that the government respected the court's instructions and did not attempt to convince the jury that the allegations were true. We have previously made clear that a district court need not allow impeachment of even a "central figure" whose out-of-court statements were not admitted for their truth. *United States v.*

McGowan, 58 F.3d 8, 15-16 (2d Cir. 1995). The district court found that "[e]vidence attacking the credibility of the Rodriguez brothers would have little if any probative value, and if permitted, [would] surely unfairly prejudice or mislead the jury and confuse the issues." The district court correctly deemed the credibility of the brothers irrelevant to the issues before the jury and properly excluded evidence impeaching them.

4. *Disqualification of AUSA Landis*

The district court denied Regan's motion to disqualify AUSA Landis because it found that he had not shown a "compelling and legitimate need" to call her as a witness or any other "good reason" to disqualify her. *Regan*, 897 F. Supp. at 758. Regan now argues that she was a non-essential participant in the trial and improperly appeared as an unsworn witness for the government. He also contends that he was unable to call her as a witness on the issue of the government's misconduct before the Grand Jury.

Regan's arguments are entirely without merit. A defendant who wishes to call a prosecutor as a witness must demonstrate a compelling and legitimate reason to do so. *United States v. Schwartzbaum*, 527 F.2d 249, 253 (2d Cir. 1975), *cert. denied*, 424 U.S. 942, 96 S. Ct. 1410 (1976). As already discussed, the district court correctly ruled that the jury would not consider allegations of governmental misconduct before the Grand Jury. As a result, there was no genuine basis or legitimate need to call AUSA Landis as a witness before the jury on the government's motivation for bringing the investigation or about its tactics before the Grand Jury. Moreover, the district court specifically ruled that Regan could call AUSA Gardephe to testify whether there was a hostile or

aggressive atmosphere during his questioning before the Grand Jury, as such an atmosphere might have supported the argument that Regan was flustered. There was therefore no compelling reason for Landis to testify on that subject.

Furthermore, Landis played a significant role in the trial. She examined one of the two government witnesses, cross-examined one of the two defense witnesses, delivered the summation, and was present throughout the trial to assist in devising strategy. Given her familiarity with the case, replacing her without a compelling reason to do so would have been an unwarranted waste of resources.

Although disqualification is sometimes appropriate to prevent an attorney from "subtly impart[ing] to the jury his first-hand knowledge of the events without having to swear an oath or be subject to cross-examination," *United States v. Locascio*, 6 F.3d 924, 933 (2d Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S. Ct. 1645 (1994), the facts of this case did not justify disqualifying Landis. Standing alone, the mere fact that a prosecutor took part in grand jury proceedings in which a defendant presented false testimony should not bar that prosecutor from participating in a subsequent trial for perjury. *See United States v. Reilly*, 33 F.3d 1396, 1422 (3d Cir. 1994).

We have not found—and Regan has not suggested—any indication in the record that Landis sought to use her first-hand knowledge of Regan's case to influence the jury. The jury's awareness of her role in the grand jury proceedings did not by itself make Landis an unsworn witness for the government. Moreover, the government offered to remove her name from the transcripts of the

grand jury proceedings so that the trial jury would be unaware of her role there, but Regan rejected this proposal, and his attorney gratuitously elicited additional comments about her activities in the investigation. We find that the district court was correct in denying Regan's pretrial motion to disqualify Landis and also that she did not act as an unsworn witness at trial.

II. *Sufficiency of the Evidence of Materiality*

18 U.S.C. § 1623(a) provides, in relevant part: "Whoever under oath . . . in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration . . . shall be fined under this title or imprisoned not more than five years, or both."

As already discussed, a false declaration before a grand jury is "material" if it " 'has a natural effect or tendency to influence, impede, or dissuade the grand jury from pursuing its investigation.' " *United States v. Gribben*, 984 F.2d 47, 51 (2d Cir. 1993) (quoting *Carroll*, 16 F.2d at 953). Courts have "broadly construed" materiality. *Gribben*, 984 F.2d at 51. A statement in grand jury proceedings is material if a " 'truthful answer *could* conceivably *have aided* the grand jury investigation.' " *United States v. Guariglia*, 962 F.2d 160, 164 (2d Cir. 1992) (quoting *United States v. Mancuso*, 485 F.2d 275, 281 (2d Cir. 1973)).

A defendant challenging the sufficiency of the evidence bears "a very heavy burden." *United States v. Scarpa*, 913 F.2d 993, 1003 (2d Cir. 1990). The court views the evidence "in the light most favorable to the prosecution," *United States v. Casamento*, 887 F.2d 1141, 1156 (2d Cir. 1989), *cert. denied*, 493 U.S. 1081,

110 S. Ct. 1138 (1990), and draws all reasonable inferences and resolves all issues of credibility in the government's favor. This court will sustain a jury verdict if "*any* rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt." *United States v. Brown*, 937 F.2d 32, 35 (2d Cir.), *cert. denied*, 502 U.S. 917, 112 S. Ct. 323 (1991).

Regan argues that the evidence of materiality was insufficient because the government did not provide the trial jury with adequate evidence of the nature of the investigation conducted by the Grand Jury before which he testified. Regan claims that the trial jury "was never told anything about what the grand jury was investigating" and thus had no evidence that his false testimony was material to the Grand Jury's investigation.

The trial transcript shows otherwise. At trial, the government presented ample evidence about the nature of the investigation in relation to which Regan testified before the Grand Jury. AUSA Chauncey Parker and Sergeant McGuigan both testified at length about the allegations concerning the Anti-Crime Unit and the resulting investigation of that Unit. They made clear that the New York City Police, assisted by federal authorities, had tried to find out whether members of the Anti-Crime Unit had used illegal tactics in making arrests and had lied about the circumstances of various arrests.

McGuigan explained at trial that the investigation of the Anti-Crime Unit was still pending as of September 27, 1994, and that significant questions were then still unanswered. For example, it remained unclear whether Regan and the Anti-Crime Unit had improperly used Ramon Rodriguez in investigations and arrests and whether there had been a conspiracy to frame Almonte.

McGuigan said that Regan was the best person available to answer these questions.

McGuigan also told the trial jury that a federal grand jury was involved in the investigation of the Anti-Crime Unit and that on six occasions he testified before it about the investigation. Later in his testimony, McGuigan made clear that he testified four times before the initial Grand Jury and twice before the Grand Jury that indicted Regan, on "[s]imilar subject matter . . . all regarding the same, overall investigation."

In addition, both the questions posed to Regan during his grand jury appearance and his answers were read into evidence. These questions and answers provided the trial jury with additional information about the nature of the grand jury investigation. For example, Regan himself stated that the Anti-Crime Unit had been under investigation for two years, that the *Almonte* and *Nieves* cases were subjects of that investigations, and that two hundred people from the 34th Precinct had been brought down for questioning.

We find that the trial jury had ample evidence of the nature of the grand jury investigation. It is clear from the trial record that the Grand Jury was investigating allegations of misconduct by members of the Anti-Crime Unit, and also that truthful answers from Regan could have assisted that investigation. We therefore reject Regan's argument that the evidence of materiality was insufficient to support his conviction.

III. *Enhancement of Regan's Sentence*

The district court imposed a three-point enhancement of Regan's sentencing range because it found that his perjury "resulted in substantial interference with the

administration of justice." U.S.S.G. § 2J1.3(b)(2). The first application note to this guideline provides that "[s]ubstantial interference . . . includes a premature or improper termination of a felony investigation."

Regan argues that the government's investigation terminated not because of his responses to its questions, but because the government's tactics before the Grand Jury were not designed to elicit helpful answers. Once again, Regan contends that the government asked him indirect questions and refused to refresh his recollection. The district court considered and rejected these arguments before trial, specifically finding that the government's questions before the Grand Jury were not "irrelevant" and that its questions were designed to refresh his recollection of his conversations with the Rodriguez brothers. The district court's finding that the investigation terminated on account of Regan's false statements was not clearly erroneous.

Regan also argues that his answers could not have terminated an investigation because the government knew from the outset that there was no legitimate investigation. As already discussed, the district court found that the investigation of the Anti-Crime Unit was legitimate. We agree with this finding, and also with the conclusion that Regan's false testimony before the Grand Jury improperly terminated that investigation. We therefore affirm the district court's imposition of the three-point enhancement for substantial interference with justice.

Conclusion

The judgment of conviction is affirmed.

Appendix B - Order and Judgment of Affirmance of the United States District Court for the Second Circuit, Filed January 6, 1997 [Pages 27a - 28a]

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

GEORGE LANGE III
CLERK

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 6th day of January, one thousand nine hundred and ninety-seven.

PRESENT: HON. Wilfred Feinberg
HON. Pierre N. Leval
HON. Fred I. Parker

Circuit Judges

Docket No 96-1211

----------X

UNITED STATES OF AMERICA,

Appellee,

-against-

PATRICK REGAN,

Defendant-Appellant.

----------X

Appeal from United States District Court for the Southern District of New York.

Appendix B
[Order and Judgment of Affirmance of the USCA for the Second Circuit]

This cause came on to be heard on the transcript of record from the Southern District of New York and was argued by counsel.

ON CONSIDERATIONS WHEREOF, it is now hereby **ORDERED, ADJUDGED, and DECREED** that the judgment of said district court be and it hereby is affirmed in accordance with the opinion of this court.

For the Court
George Lange III, Clerk
By:

_____
Beth J. Meador
Administrative Attorney

Appendix C - Opinion and Order of the United States District Court for the Southern District of New York, Filed July 28, 1995 (897 F.Supp. 748 (1995) [Pages 29a - 55a]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X

UNITED STATES OF AMERICA

OPINION

95 Cr. 29 (DC)

-against-

PATRICK REGAN,

Defendant.
----------X

APPEARANCES: MARY JO WHITE
United States Attorney for the
Southern District of New York
By: Deborah E. Landis
Assistant United States Attorney
1 St. Andrew's Plaza
New York, New York 10007

DAVID S. GREENFIELD, Esq.
Attorney for Defendant
41 Madison Avenue
New York, New York 10010

CHIN, D.J.

In this perjury prosecution of a New York City police officer, defendant Patrick Regan moves to dismiss

Appendix C
[Opinion and Order of the USDC for the SDNY]

the indictment or portions thereof on the grounds that (1) the declarations alleged to be false in the indictment were not "material" to any Grand Jury investigation but were elicited solely as part of a "perjury trap," (2) the Grand Jury that issued the present indictment was not properly instructed on the element of "materiality," (3) the indictment fails to properly allege "materiality," and (4) the questions upon which the indictment are based are "fundamentally ambiguous" and therefore insufficient to support the charges of perjury. Regan also moves to disqualify the two prosecutors who questioned him before the Grand Jury on the grounds that he may call them as witnesses or, if he does not, that they are "unsworn witnesses."

For the reasons that follow, defendant's motions are denied in all respects.

The Facts

In 1991 and 1992, Regan was a member of the 34th Precinct Anti-Crime Unit, a plain-clothes unit of the New York City Police Department that operated in the Washington Heights area of Manhattan and focused primarily on violent crime. This prosecution is based on Regan's testimony in the Grand Jury on October 13 and 18, 1994. Regan is charged with committing perjury when he was questioned in the Grand Jury about certain telephone calls he had with two brothers, Ramon and Jose Rodriguez. The telephone calls had been placed to Regan by the Ramon brothers at the behest of Government investigators, who were investigating whether members of the Anti-Crime Unit had engaged in a pattern of, among other things, falsifying the circumstances of arrests they made

A. The Almonte Case

On August 14, 1992, Regan and two other members of the Unit arrested one Jorge Almonte on narcotics and firearms charges. Almonte was turned over to federal authorities for prosecution. The officers represented to the authorities that, while driving on 187th Street, they noticed Almonte stepping from the basement of a building with a gun in his waistband. They also represented that after they gave chase, Almonte dropped a bag containing narcotics before running back into the building.

After Almonte's arrest, his attorney represented to the Government that the officers had falsified the circumstances surrounding Almonte's arrest. In October 1992, the United States Attorney for the Southern District of New York and the Internal Affairs Division of the New York City Police Department commenced an investigation into whether members of the Anti-Crime Unit had made false statements in connection with the arrest of Almonte and others.

After interviewing a number of witnesses, including a cable installer who had been working in the building in question at the time of Almonte's arrest, the Government determined that the police officers' version of the events following Almonte's arrest appeared to be untrue. Eventually, the Government filed a *nolle prosequi* and the charges against Almonte were dismissed.

B. The Nieves Case

On July 22, 1992, three members of the Anti-Crime Unit arrested two individuals, Nieves and Abreu, for possession of firearms and narcotics. Regan was not involved, but two of the three officers were also later involved in the arrest of Almonte.

At a suppression hearing in the federal prosecution that followed, the officers testified that they saw someone climb out of a window with a gun in his waistband and then retreat back into the window. At the same time, one of the officers saw another man inside the same apartment, standing at the window holding a gun. One of

the officers testified that after they eventually entered the apartment, he accidentally bumped into a table with a sliding top, causing the top to slide open to reveal, "in plain view," a secret compartment holding firearms, ammunition and narcotics.

The suppression motion was denied. Thereafter. however, new evidence concerning the arrest of Nieves and Abreu came to light that indicated that some of the events described by the officers during their testimony in the suppression hearing had not happened and, indeed, were physically impossible. Consequently, the Government determined, based on this new evidence as well as concerns arising from the *Almonte* case, that further investigation into the officers' accounts was warranted. After conducting further investigation. the Government concluded that the officers involved in the *Nieves* case had not been truthful. Hence, the Government filed a *nolle prosequi* and the charges against Nieves and Abreu were dismissed.

C. The Government's Investigation of the Anti-Crime Unit Broadens

The Government thereafter contacted the New York County District Attorney's Office to inquire about other cases in which members of the Anti-Crime Unit had participated. After conducting its own review, the District Attorney's Office referred several cases to the United States Attorney's Office for further review.

In November 1992, investigators interviewed Regan. He was advised that he and other members of the

Anti-Crime Unit were under investigation. He denied, however, that he or any other members of the Unit had engaged in any misconduct. Thereafter, and continuing into 1994, an extensive Grand Jury investigation was conducted by the Government into whether members of the Anti-Crime Unit had engaged in a pattern of falsifying the circumstances of arrests they made, committing perjury, and otherwise violating the civil rights of individuals arrested. The Government interviewed many witnesses and presented evidence to the Grand Jury. No indictments were issued however, and the term of the original Grand Jury apparently expired.

By May 1994, in part because the cable installer who had been present in the building in question on the date of Almonte's arrest could no longer be located, the Government no longer viewed as viable a prosecution against the Anti-Crime Unit officers involved in the *Almonte* case. The Government was, however, still considering whether to seek an indictment against the three officers involved in the *Nieves* case.

D. The Rodriguez Brothers

In May 1994, the Government was informed by a cooperating witness named Jose Rodriguez that he had information about members of the Anti-Crime Unit. He advised the Government of a meeting he had with his brother Ramon, Regan and other members of the Anti-Crime Unit in December 1992. He provided information to the effect that Regan and other members of the Anti-Crime Unit were trying to locate Jorge Almonte

on or about December 1992. Indeed, he stated that during the December 1992 meeting, Regan had asked Jose Rodriguez and his brother for their assistance in trying to locate Almonte, and Regan gave an address on 187th Street where they were to look for Almonte. Jose Rodriguez also advised the Government of other contact he had with Regan following the December 1992 meeting.

The information provided to the Government by Jose Rodriguez was corroborated in certain respects. For example, Rodriguez stated that Regan had told him that he had been transferred from the 34th Precinct to the 24th Precinct; the fact of the transfer was confirmed by Internal Affairs. Rodriguez also stated that he had been confined with Almonte at the Metropolitan Correctional Center in 1992, and that fact also was confirmed by the Government. Consequently, the Government decided to investigate Rodriguez's allegations further.

On June 2, 1994, at the instruction of investigators, Jose Rodriguez telephoned Regan at the 24th Precinct to say that he had located Almonte. In fact, Rodriguez had not located Almonte, but Rodriguez was asked to call Regan to obtain corroboration for Rodriguez's allegations that he knew Regan and had spoken to him about the investigation into the Anti-Crime Unit and to obtain evidence shedding light on Regan's motive for seeking Almonte. Rodriguez reached Regan, and the telephone conversation was recorded. The transcript confirms that Regan knew Rodriguez and that Regan had previously talked to Rodriguez about "that guy" from "187th Street."

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The transcript also shows that Regan said to Rodriguez: "[W]e're just going to let things die down and go whatever way they're going to go."

The Government met with Ramon Rodriguez on August 26, 1994. Although the Government had doubts about his credibility,[1] it decided that it was important to interview Ramon Rodriguez about what he knew about the Anti-Crime Unit. Ramon Rodriguez told the Government that he had been an informant for the Anti-Crime Unit on several cases and that he had been actively involved with Regan. Ramon Rodriguez also advised the Government that Regan had told him that members of the Anti-Crime Unit wanted to plant drugs on Almonte, who had accused the officers of having stolen money from them. Rodriguez also stated that Regan had given him a photograph of Almonte and had asked him to try to locate Almonte. Rodriguez also stated that he had told Regan that he was going to be interviewed by federal authorities about the Anti-Crime Unit and that Regan had instructed him to telephone, after the meeting to report what had transpired.

Investigators asked Ramon Rodriguez to telephone Regan, as Regan had purportedly requested, to report on the interview. On August 26, 1994, under the supervision

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[1] According to Regan's present attorney, Ramon Rodriguez has admitted giving false information in another case to a prosecutor not involved in this case. Apparently, the Government does not intend to call Ramon Rodriguez as a witness in this case.

of investigators, Ramon Rodriguez telephoned Regan, and the call was recorded. The transcript shows that Rodriguez spoke to Regan about his interview at length; Regan asked a number of questions about what the investigators had asked Rodriguez; he also suggested to Rodriguez that he tell the investigators that the officers "were very good cops" and that Rodriguez tell them not to "bother" him again.

Thereafter, Ramon Rodriguez was served with a Grand Jury subpoena returnable September 4, 1994. He was told, however, that he would not have to appear on that date if he continued to make himself available.

On August 29, 1994, Ramon Rodriguez called Regan, and again the conversation was recorded. The transcript shows that Rodriguez reported to Regan on a second interview he had with the authorities. The transcript shows that during the conversation, Rodriguez and Regan discussed Almonte; near the end of that particular discussion, the transcript shows that Regan said to Rodriguez: "You know nothing, you understand?"

Thereafter, Ramon Rodriguez made three more telephone calls to Regan: on September 8, 14 and 27, 1994. They talked about a subpoena that Rodriguez had received and inquiries the investigators had made about Almonte and a photograph of Almonte. Regan denied knowing who Almonte was.

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E. Regan's Grand Jury Testimony

At or about the end of September 1994, the Government decided to grant immunity to Regan in exchange for his testimony. The Government decided to immunize Regan because: (1) there was insufficient evidence at that point to charge any of the three officers involved in the *Almonte* case; (2) the Government was hopeful that Regan would provide evidence to permit the Government to proceed against the other two officers involved in the *Almonte* case; (3) those two officers were also involved in the *Nieves* case and the Government was hopeful that Regan might have knowledge of the circumstances of that case; and (4) the Government was hopeful that Regan would provide testimony that would be helpful with respect to another arrest in which Regan and other members of the Anti-Crime Unit had been involved that had occurred in the vicinity of Broadway and 170th Street, during which one of the other officers fired his weapon.

While the Assistant United States Attorney in charge of the investigation, Deborah E. Landis, recognized that Regan might commit perjury rather than implicate his fellow police officers, she was hopeful that he would testify truthfully and thereby provide evidence that would shed light on the *Almonte* case and other matters in question.

Regan appeared before the Grand Jury on October 13 and 18, 1994 under a court-ordered grant of immunity. He was examined in the Grand Jury by Ms. Landis as

well as Assistant United States Attorney Paul Gardephe. He was asked questions about the Anti-Crime Unit, the Unit's use of confidential informants, conversations he had had with the Rodriguez brothers, the *Almonte* case, the *Nieves* case, and the arrest at 170th Street and Broadway during which one of the officers discharged his weapon. During these sessions, he was also asked the questions and provided the answers that form the basis for the present charges of perjury.

Although he had been recorded having one conversation with Jose Rodriguez in June 1994 and five conversations with Ramon Rodriguez in August and September 1994, during which they discussed the federal investigation of the Anti-Crime Unit at length. Regan testified in the Grand Jury in October 1994 that (a) he could remember nothing about his conversations with Ramon other than that Ramon called to say hello, (b) he and Ramon did not discuss anything about the investigation other than Regan saying that the officers were under investigation, (c) he was not aware of whether Ramon had been questioned by the federal authorities, (d) he could not recall Ramon saying that he had been questioned, (e) he could not recall Ramon saying that he had been subpoenaed, (f) he could not recall having any conversation with Jose, and (g) he did not even know Jose.

F. <u>The Indictment</u>

Prior to seeking a perjury indictment, the Government met with Regan's prior counsel. The

Government offered Regan and his then-attorneys the opportunity to review the tape recordings of the conversations with the Rodriguez brothers, and told Regan's counsel that the Government was still interested in seeking a truthful explanation of the *Almonte* matter.

Regan and his counsel accepted the Government's offer and listened to the tape recordings. The Government then advised Regan that if he were to concede that he had not been truthful in his answers in the Grand Jury about the *Almonte* case, the Government would want to ask follow-up questions that had been foreclosed by his testimony. Although a follow-up meeting was scheduled, Regan and his then-counsel failed to appear for the scheduled meeting.

The next day, the indictment in this case was issued.

DISCUSSION

A. Materiality

Regan's principal argument is that the declarations alleged to be false in the indictment were not "material" to any Grand Jury investigation, but were elicited solely as part of a "perjury trap." Regan argues that his due process rights were violated because he was subpoenaed to testify, not for any legitimate investigatory objective, but "for the primary purpose of obtaining testimony from him in order to prosecute him later for perjury." *Wheel v. Robinson*, 34 F.3d 60, 67 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 1697 (1995) (quoting *United States v. Chen*, 933 F.2d 793, 796-97 (9th Cir. 1991)).

In *Wheel*, while noting that some courts have accepted the "perjury trap" defense, the Second Circuit declined to decide whether the defense is available in this Circuit, for the facts of *Wheel* rendered the defense inapplicable. 34 F.3d at 67-68. Hence, the validity of the "perjury trap" defense is an open question in this Circuit.

Likewise, I do not reach the issue, for it is clear from the record before me, which includes the minutes from the Grand Jury proceedings, which I have reviewed *in camera*,[2] that the Grand Jury was conducting a *bona*

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[2] Citing a long line of cases, the Government argues that inspection of the Grand Jury minutes is not warranted because of the speculative nature of Regan's allegations. See, e.g. *United States v. Leung*, 40 F.3d 577, 582 (2d Cir. 1994) ("A review of grand jury minutes should not be permitted without concrete allegations of Government misconduct . . . ."). While

fide investigation into suspected wrongdoing by the Anti-Crime Unit. The record unequivocally shows that Regan was subpoenaed by the Grand Jury not for the purpose of "trapping" him into committing perjury, but for the purpose of seeking evidence that would assist the Grand Jury in its inquiry into the activities of the Anti-Crime Unit. The questions that were put to him were intended to assist in, and were material to, that inquiry. See *Wheel*, 34 F.3d at 68 ("perjury trap" defense "inapplicable" where there was "a legitimate basis both for the inquest and for the particular questions that [the defendant] answered falsely").

The test for materiality is whether "the question posed is such that a truthful response could potentially aid the inquiry or a false answer hinder it. "*United States v. Gribben,* 984 F.2d 47, 51 (2d Cir. 1993) (quoting *United States v. Moon*, 718 F.2d 1210 (2d Cir. 1983), *cert. denied*, 466 U.S. 971 (1984)). The standard "is whether the false testimony has a natural effect or tendency to influence, impede, or dissuade the grand jury from pursuing its investigation." *Gribben*, 984 F.2d at 51-52.

Regan argues that his testimony in the Grand Jury was not "material" because there was no legitimate Grand Jury investigation pending, only a "perjury trap" set by prosecutors disappointed with their inability to indict any member of the Anti-Crime Unit. Regan's accusation,

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I agree that Regan has not made a sufficient showing, I have nonetheless reviewed the Grand Jury minutes out of an excess of caution.

however, that the Government abused Grand Jury process is based on assumptions and speculation. Regan is simply wrong about a number of factual issues, and the record before me unequivocally shows that the Government did not engage in any improper conduct.

Regan contends that the Grand Jury was not informed that the telephone calls made by the Rodriguez brothers were, to use his counsel's word, "staged." In fact, the Grand Jury was advised that the Rodriguez brothers were asked by Internal Affairs to make the telephone calls, that Jose Rodriguez was instructed by Internal Affairs to tell Regan that he had seen Almonte, and that the telephone calls were recorded. Hence, the Grand Jury was not misled into believing these calls were actually instigated by the Rodriguez brothers themselves. Moreover, as set forth in more detail below, Regan is simply wrong when he argues that he was not asked questions intended to elicit information about the Anti-Crime Unit's arrest of Almonte or others. He is simply wrong when he alleges that the Government asked irrelevant questions and refused to try to refresh his recollection or quote him portions of the transcripts of the telephone conversations. Finally, and most fundamentally, he is simply wrong when he claims that the Grand Jury was not actually investigating the Anti-Crime Unit. The record plainly shows that it was.[3]

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[3] In fact, the caption on the transcripts of the Grand Jury proceedings of October 18 and 25, 1994 submitted for *in camera* review shows the name of one of the other members of the Anti-Crime Unit (followed by "et al.") as the first-named defendant.

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B. The Government's Instructions to the Grand Jury on Materiality

Based on what can only be described as sheer speculation, Regan argues that "the Grand Jury was not properly instructed on the element of 'materiality'." (Greenfield Aff in Support of Motion to Dismiss ¶ 3). The minutes of the Grand Jury proceedings, however, show otherwise. The relevant portion of the statute, 18 U.S.C. § 1623, was read to the Grand Jury, and the Grand Jury was instructed that the standard for materiality was whether a truthful response could potentially aid the Grand Jury's inquiry or whether a false response could potentially hinder the inquiry. This instruction was completely consistent with the test for materiality set forth in *Gribben,* 984 F.2d at 51, and *Moon*, 718 F.2d at 1237. Moreover, the Grand Jury was specifically instructed to consider whether the answers given by Regan could potentially have assisted the Grand Jury in determining, among other things, the relationship between the Anti-Crime Unit and Jose Rodriguez, the relationship between the Anti-Crime Unit and Ramon Rodriguez, and whether there was a plan to plant drugs on Jorge Almonte. Finally, the Grand Jury was specifically cautioned that the materiality requirement was intended to ensure that no one was indicted for perjury for testifying to something that was "completely irrelevant to a legitimate inquiry." By indicting Regan, the Grand Jury showed that it believed Regan had testified to something that was indeed relevant to a legitimate inquiry

C. Sufficiency of the Indictment

Regan challenges the sufficiency of the indictment on the grounds that it purportedly "says nothing" about what the Grand Jury was investigating or about the presentation of any evidence to the Grand Jury. Relying on *United States v. Slawik*, 548 F.2d 75, 78 n.5 (3d Cir. 1977), Regan argues that the indictment in this case should have alleged what was "material" to the Grand Jury's investigation.

As a factual matter, however, Regan is again incorrect. Paragraph 11 of the indictment charges that Regan was subpoenaed to appear before a Grand Jury "[i]n connection with the federal investigation into the activities of the Anti-Crime [Unit] members and their relationship with Ramon and Jose Rodriguez."[4] Paragraphs 1 through 10 of the indictment provide background information as well as certain details of the investigation. In particular, paragraph 4 alleges that the United States Attorney and the New York City Police Department Internal Affairs Bureau initiated an investigation, later joined in by the Federal Bureau of

[4] Regan argues that the reference to "federal investigation" in paragraph 11 of the indictment is inadequate, contending that a "federal investigation" is not necessarily the equivalent of a "Grand Jury" investigation. These arguments are rejected. First, the words "federal investigation" on their face clearly encompass a Grand Jury investigation. Second, the Grand Jury before which Regan appeared in fact was investigating the Anti-Crime Unit.

Investigation, "into whether members of the Anti-Crime Unit had made false statements in connection with the arrest of Jorge Almonte and other individuals. "Finally, paragraphs 12 and 14 allege that Regan made "false material declarations" in his testimony to the Grand Jury.

A fair reading of the indictment reveals that it does give sufficient notice of what the Grand Jury was investigating: whether members of the Anti-Crime Unit made false statements in connection with the arrest of Jorge Almonte and others. Moreover, the indictment tracks the language of the perjury statute and contains more than sufficient detail to inform Regan of the charges against him and to enable him to plead double jeopardy in the event he were to be prosecuted in the future on the basis of the same events. *Russell v. United States*, 369 U.S. 749, 763-64 (1962); *United States v. Stavroulakis*, 952 F.2d 686, 693 (2d Cir.), *cert. denied*, 504 U.S. 926 (1992); *see also United States v. Tramunti*, 513 F.2d 1087, 1113 (2d Cir.), *cert. denied*, 423 U.S. 832 (1975) ("an indictment need do little more than to track the language of the statute charged and state the time and place (in approximate terms) of the alleged crime") (citation omitted).

The indictment is adequately pleaded.

D. Ambiguity

Regan next argues that the indictment or, at minimum, certain specifications thereof, must be dismissed on the grounds that the questions asked of him in the Grand Jury were "fundamentally ambiguous" or "too inartfully phrased to support a charge of perjury." Both Regan and the Government rely on *United States v. Lighte,* 782 F.2d 367, 375 (2d Cir. 1986), in which the Second Circuit held that "[w]hen a line of questioning is so vague as to be 'fundamentally ambiguous,' the answers associated with the questions posed may be insufficient as a matter of law to support [a] perjury conviction." See also *United States v. Wolfson,* 437 F.2d 862, 878 (2d Cir. 1970); *United States v. Landau,* 737 F. Supp. 778, 781-84 (S.D.N.Y. 1990) (" '[p]recise questioning is imperative as a predicate for the offense of perjury' "; the "burden [is on the questioner] 'to pin the witness down to the specific object' of the [questioner's] inquiry") (quoting *Bronston v. United States*, 409 U.S. 352, 360, 362 (1973)).

In *Lighte,* the Court explained that "[a] question is fundamentally ambiguous when it 'is not a phrase with a meaning about which men of ordinary intellect could agree, nor one which could be used with mutual understanding by a questioner and answerer unless it were defined at the time it were sought and offered as testimony." 782 F.2d at 375 (quoting *United States v. Lattimore*, 127 F. Supp. 405 (D.D.C.), *aff'd per curiam by an equally divided court*, 232 F.2d 334 (D.C. Cir. 1955)). *Lighte* also clearly stated, however, that the defense of

ambiguity may not be established by taking a statement out of context. 782 F.2d at 375.

In the present case, Regan makes essentially two arguments. First, he contends that in the Grand Jury he acknowledged that he had conversations with two individuals named Rodriguez but could not recall the specifics; he claims that the Government did not provide him with a specific quote or "any other form of probing" and that the Government refused his requests to have his recollection refreshed. (Def. Mem. on Ambiguity at 5-6). Second, he argues that certain specifications were "fundamentally ambiguous" or "too inartfully phrased," citing in particular specifications (a), (b), (f), (i), (t) through (w), (x), (y), (aa), and (ee) of Count 1 and specifications (f), (g), (l) and (q) of Count 2.

As to Regan's first argument, he is simply incorrect as a factual matter. As the transcripts of his Grand Jury testimony show, the Government quoted from or paraphrased the transcripts of the telephone conversations and probed Regan's memory by asking about specifics of the telephone conversations numerous times. (*See* Landis Aff., Exh. G at 47 ("Q . . . "I'm trying to focus on things that would be more fresh in your mind . . . ."), 48 ("Q Did he tell you . . . ?"), 49, 55 ("Q Does the name Jose refresh your recollection?"), 57 ("Q Did Ramon Rodriguez speak to you within the last three months about having been questioned regarding . . . ?"), 62 (asking about discussions with Ramon Rodriguez about Internal Affairs Officer Thomas McGillan), 67; Landis Aff., Exh. H at 60 (quoting from transcript of telephone conversation),

61-62 ("Q Isn't it a fact, Officer Regan, that when Jose Rodriguez told you that he had just seen the guy from 187th Street, that you responded 'that's good, but we are going to let things die down and go whatever way they are going to go' and that you said to him later in the conversation that you are going to, 'play things by the book?'"), (72-73).

While it is true, as Regan asserts, that he asked during his Grand Jury testimony whether the Government had "any paperwork or . . . recorded conversations" that he could use to refresh his recollection (Landis Aff., Exh. H at 56), there certainly was no obligation on the part of the Government to show Regan the transcripts or even to reveal to him that the conversations with the Rodriguez brothers had been recorded. Indeed, the Government was entitled to question Regan on the basis of his recollections without showing him a transcript. See *United States v. D`Auria*, 672 F.2d 1085, 1093 (2d Cir. 1982) ("There is no requirement that the government reveal to a perjurer that it has evidence of the untruthfulness of his statements, much less that it reveal evidence to a witness whom it believes to have committed perjury."); *United States v. Del Toro*, 513 F.2d 656, 664 (2d Cir.), *cert. denied*, 423 U.S. 826 (1975) ("there is no duty on the prosecution to tell a Grand Jury witness what evidence it has against him" or to disclose existence of tape-recordings); *United States v. Costarelli*, 685 F. Supp. 35, 36-37 (E.D.N.Y. 1988) (rejecting defendant's contention that Government should have revealed the contents of his wiretapped conversations prior to his Grand Jury testimony).

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As to the specifications that Regan contends are fundamentally ambiguous or so unartfully phrased as to be insufficient to support a perjury charge, I find that they are not. I have carefully reviewed the questions and answers in issue and I have read, in their entirety, both transcripts of Regan's Grand Jury testimony; I have no doubt that Regan understood the questions that were put to him.

When the specifications are placed in context, it is clear that Regan was being asked for his recollections about (a) the "four or five" conversations he acknowledged having had with Ramon Rodriguez in the three or six months immediately prior to his appearance in the Grand Jury and (b) a telephone conversation that he had had with Jose Rodriguez in the same general time frame. It is also clear that Regan understood this. The fact that some of these questions used open-ended words such as "anything else" and "ever" did not render the questions, when considered in context, fundamentally ambiguous. See *United States v. Kross,* 14 F.3d 751, 756 (2d Cir.), *cert. denied*, 115 S. Ct. 99 (1994) ("We agree . . . that 'ever' is not an imprecise word."). When Regan was asked, for example, whether he had "ever" told Ramon Rodriguez not to mention his name "in connection with any questioning of the Anti-Crime Unit" (Landis Aff., Exh. G at 67),[5] Regan surely understood the question to

[5] Regan argues that the use of the word "of" renders the phrase "questioning of the Anti-Crime Unit" in specification (aa) fundamentally ambiguous, because the words could have implied "questioning [of Rodriguez] by the Anti-Crime Unit." (Def. Mem. on Ambiguity at 9-10). When placed in context,

include the conversation he had with Ramon Rodriguez on August 29, 1994, less than two months earlier, when he twice told Rodriguez "don't mention my name." (Landis Aff., Exh. D at 28).

The motion to dismiss the indictment or portions of it on the ground of ambiguity is denied.

E. Disqualification

Finally, Regan moves to disqualify from participating in the trial of this action Assistant United States Attorneys Landis and Gardephe, the two prosecutors who examined him in the Grand Jury. Regan contends that it his intention to call both prosecutors as witnesses at trial to establish that they (i) refused to advise him in advance of the subject matter of the Grand Jury's inquiry, (ii) refused to ask certain questions and to provide him with tapes and transcripts when he asked to have his recollection refreshed, and (iii) treated him with sarcasm, contempt and hostility. He further argues that even if the prosecutors are not called to testify at trial, they should be disqualified because otherwise they will function as "unsworn witnesses."

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however, the question is unambiguous; Regan clearly understood that he was being asked whether he had ever instructed Rodriguez not to mention his name during any questioning of Rodriguez by federal investigators about the Anti-Crime Unit.

The arguments made by Regan are remarkably similar to the arguments rejected by Judge Owen in *United States v. Wallach,* 788 F. Supp. 739 (S.D.N.Y.), *aff'd*, 979 F.2d 912 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 2414 (1993) (citing *United States v. Schwartzbaum*, 527 F.2d 249, 253 (2d Cir. 1975), *cert. denied*, 424 U.S. 942 (1976)). In *Wallach,* the defendant moved to disqualify two Assistant United States Attorneys from retrying a case following a reversal of the defendant's conviction in the first trial on the grounds that the prosecutors were "motivated by a desire to 'vindicate' themselves" and because they would be called as witnesses or would act as "unsworn witnesses." 788 F. Supp. at 742-44. The Court denied the motion, finding that persons other than the prosecutors could testify, that the necessity of certain testimony would be obviated by the Governments offer to stipulate to certain facts, and that the Government would be prejudiced by a "late-hour" reassignment of the case to different prosecutors 788 F. Supp. at 744.

As the Court held in *Wallach,* to call a prosecutor as a witness, "a defendant must demonstrate a compelling and legitimate need to do so." 788 F. Supp. at 743. Where witnesses other than the prosecutor can testify to the same matters in question, no compelling need exists. *Wallach,* 788 F. Supp. at 744 (citing *United States v. Roberson,* 897 F.2d 1092, 1098 (11th Cir. 1990)). *See also United States v. Torres,* 503 F.2d 1120, 1126 (2d Cir. 1974) (reversing a conviction where prosecutor testified to impeach the testimony of Government witness, and there was no showing that other witnesses were unavailable to testify).

Here, Regan has failed to demonstrate a "compelling and legitimate need" to call Assistant United States Attorney Landis as a witness and he has failed to show good reason for disqualifying her. First, the Government will stipulate to the fact Ms. Landis refused to inform Regan of the subject matter of the Grand Jury's inquiry prior to his appearance. Second, the Government's thought processes in deciding what questions to ask, how to ask them. and whether or not to refresh defendant's recollection are not relevant. Third, Assistant United States Attorney Gardephe is not participating in the trial of this case and he is available to testify even if his testimony were to be relevant. Fourth, Regan's argument that Ms. Landis will become an "unsworn witness" is unconvincing, for every lawyer in every trial is to some extent an "unsworn witness." In many criminal cases, defense counsel seek to make an issue out of the prosecutor's conduct, e.g., by cross-examining witnesses on whether prosecutors sought to influence their testimony or offered inducements for favorable testimony, and disqualification cannot be ordered every time this happens. Fourth, unlike in many situations where prosecutors become potential witnesses because of their personal involvement, here there was a court reporter present in the Grand Jury transcribing every question and answer. Finally, the Government would be prejudiced were I to disqualify Ms. Landis now, for she has spent an extensive amount of time on this case; it would be unfair at this late date to require the Government to bring in a new prosecutor with trial to commence in some two weeks.

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The request to disqualify Ms. Landis is denied. The request to disqualify Mr. Gardephe is moot, as the Government has represented that he will not be participating in the trial of this case.

CONCLUSION

For the reasons set forth above, defendant Regan's motions are denied in all respects.

One final issue needs to be addressed. The Supreme Courts decision in *United States v. Gaudin*, 63 U.S.L.W. 4611 (U.S. June 19, 1995), makes it clear that "materiality," as an element of the crime of perjury, is an issue to be decided by the jury. Regan's "perjury trap" defense, however, which is premised on his allegations that the Government abused the Grand Jury process and thereby violated his due process rights (Def. Mem. on Materiality at 5-8), is an issue not for the jury but rather for the Court. See *United States v. Cuervelo*, 949 F.2d 559, 567 (2d Cir. 1991) (motion alleging "outrageous governmental conduct" is a matter of law for trial court to decide); *United States v. Nunez-Rios*, 622 F.2d 1093, 1098 (2d Cir. 1980) (claim that Government misconduct violated defendant's due process rights was "not for the jury to consider, but must be decided by the trial court"). Since I have now rejected the "perjury trap" defense, evidence in support of it will not be permitted at trial.

SO ORDERED.

Dated: New York, New York
July 28, 1995

By:

_____
Denny Chin
United States District Judge

Appendix D - Order of the United States Court of Appeals for the Second Circuit on Rehearing, Filed February 25, 1997 [Pages 56a - 57a]

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

GEORGE LANGE III
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 25th day of February one thousand nine hundred and ninety-seven.

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USA

-against-

Dkt No: 96-1211

Regan

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A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by the appellant Patrick Regan.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court
George Lange III, Clerk
By:

_____
Beth J. Meador
Administrative Attorney

Appendix E - Decision and Order of Judge Chin, Dated August 9, 1995 [Pages 58a - 63a]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA

MEMORANDUM DECISION

- against -

95 Cr. 29 (DC).

PATRICK REGAN,

Defendant.

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Chin, D.J.

On August 1, 1995, I issued an opinion in which I, among other things, rejected the defendant's "perjury trap" defense and held that the defendant could not present evidence at trial in support of his argument that there was no bona fide Grand Jury investigation pending when he testified in the Grand Jury. Two follow-up issues have arisen. First, the defendant contends that he should be permitted to present evidence at trial to support his "contrived materiality" argument, i.e., that the Grand Jury investigation was contrived and therefore his testimony was not relevant to any legitimate Grand Jury investigation. Defendant contends that he is entitled to make this argument to the jury because the Supreme Court's recent decision in *United States v. Gaudin,* No. 94-514, 1995 WL 360212 (U.S. June 19, 1995), makes it clear that "materiality" is an issue for the jury. Second, the Government has advised the defendant and the Court

(on the eve of trial) that it will not be calling Jose Rodriguez as a witness. Hence, the Government contends that the defendant should be precluded from impeaching the credibility of Jose Rodriguez or Ramon Rodriguez (who likewise will not be testifying).

The defendant's "contrived materiality" argument is essentially his perjury trap argument under a different label. He is still contending that the Grand Jury investigation was a sham and that the Government "contrived" the investigation solely for the purpose of eliciting perjurious testimony. I have found, however, on the basis of a careful review of the record, including the Grand Jury minutes, that the Grand Jury investigation into the activities of the Anti-Crime Unit was not a sham. Hence, the "contrived materiality" argument is rejected as well.

Defendant's contention that he should be permitted to make his "contrived materiality" argument to the jury gives me some pause, particularly in light of *Gaudin.* The case law, however, makes it clear that the issue is one for the Court only and not the jury. See, *e.g., United States v. Cuervelo*, 949 F.2d 559, 567 (2d Cir. 1991); *United States v. Rosado*, 728 F.2d 89, 93, 95 (2d Cir. 1984); *United States v. Nunez-Rios*, 622 F.2d 1093, 1098 (2d Cir. 1980). In *Rosado*, the trial court permitted the defendants to argue to the jury at trial that "the Government was misusing the grand jury as an instrument of political oppression, rather than seeking indictment of those responsible for serious crimes." 728 F.2d at 95. The Second Circuit observed that "[i]t would have been

preferable to leave any issues of the lawfulness of the grand jury inquiry for determination by the Court." *Id.* The Second Circuit noted that the trial court had "permitted evidence on issues inappropriate for jury consideration," and commented that the trial was "turn[ed] . . . away from a determination of whether the elements of the offense charged had been proved beyond a reasonable doubt into a wide-ranging inquiry into matters far beyond the scope of legitimate issues in a criminal trial." 728 F.2d at 91, 93. Among other things, the Second Circuit expressed concern that the defendants were permitted to "invited[] jury nullification by questioning the Government's motives in subpoenaing [defendants to testify in the grand jury] and prosecuting them for contempt [after they refused to appear]." 728 F.2d at 93.

The arguments that defendant seeks to make at trial are similar to the arguments the Second Circuit suggested the defendants in *Rosado* should not have been permitted to make at trial. Regan's arguments that the Grand Jury in this case was misused, that the Grand Jury investigation here was unlawful and a sham, and that the Government had improper motives for subpoenaing him to testify in the Grand Jury are matters for the Court and not for the jury. I have considered these arguments and I have rejected them as meritless. I will not permit the defendant to pursue these matters at trial.

Ultimately, *Gaudin* does not change my thinking on this issue. The issue of materiality -- whether defendant's answers would have assisted or hindered the

Grand Jury's investigation of the Anti-Crime Unit -- will be put to the jury. The issues of the lawfulness of that investigation and the propriety of the Government's conduct will not.

Likewise, the defendant will not be permitted at trial to present evidence or to ask questions designed solely to impeach the credibility of Jose and Ramon Rodriguez. Their statements are not being offered for the truth of the matters asserted therein; rather, they will be offered to show the nature and scope of the Government's investigation into the Anti-Crime Unit.

For purposes of this trial, it is irrelevant whether the statements of Jose and Ramon Rodriguez were truthful. They had made certain allegations. The Grand Jury was investigating those allegations, and the point is that the Grand Jury was trying to ascertain the truthfulness of the allegations. One way that it sought to do so was to immunize the defendant Regan to hear his testimony. The critical issues for this trial are whether Regan perjured himself and whether his answers would have aided or hindered the investigation.

Hence, the credibility of Jose Rodriguez and Ramon Rodriguez are not in issue and, consequently, defendant will not be permitted to attack their credibility. The case law is clear, as the cases uniformly hold that where a non-witness informant's out-of-court statements are not offered for their truth, the informant's credibility is not relevant and evidence intended to impeach him may properly be excluded. See, *e.g.*, *United States v.*

McGowan, 58 F.3d 8, 15-16 (2d Cir. 1995); *United States v. Martinez*, 979 F.2d 1424, 1429 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 1824 (1993); *United States v. Friedman*, 854 F.2d 535, 569-70 (2d Cir. 1988), *cert. denied*, 490 U.S. 1004 (1989).

Since the statements of Jose and Ramon Rodriguez are not being offered for their truth, evidence that the defendant seeks to present in this case attacking their credibility can only serve two conceivable purposes: First, to support his "perjury trap" or "contrived materiality" defense; and second, to seek jury nullification by suggesting that a highly decorated police officer should not be sent to jail on the say-so of a lying drug dealer and would-be murderer. The perjury trap and contrived materiality arguments have been rejected, however, and the second purpose clearly is not a legitimate one.

Evidence attacking the credibility of the Rodriguez brothers would have little if any probative value, and if permitted, will surely unfairly prejudice or mislead the jury and confuse the issues.

That is not to say all evidence relating to the backgrounds of the Rodriguez brothers will be excluded. As the Government essentially acknowledges in its letter of August 7, 1995, certain background information is necessary and I will permit a limited amount of background, whether elicited by the Government or defendant, to provide a context for the Government's investigation. The amount of background evidence, however, will be strictly limited, and evidence intended

solely to attack the credibility of the Rodriguez brothers will be excluded.

SO ORDERED.

Dated: New York, New York
August 9, 1995

DENNY CHIN
United States District Judge